United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

77-1004

To be argued by
JOHN P. FLANNERY, II

B/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1004

UNITED STATES OF AMERICA,
Appellee,

—v.—

ANTONIO FLORES,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Antonio Flores appeals from a judgment of conviction entered on November 3, 1976, in the United States District Court for the Southern District of New York, after a two-week trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 73 Cr. 19 was filed on January 8, 1973, in two counts, charging Antonio Flores and fifteen others with conspiring to import and distribute narcotics, in violation of Title 21, United States Code, Sections 173, 174, between January 1, 1968 and April 30, 1971.* Flores was only named in Count One, the conspiracy count. At

* Three of the co-defendants, including Horacio Quinones, then an attorney, proceeded to trial before Judge Bonsal in 1973, and were convicted. Their convictions were affirmed on appeal.

[Footnote continued on following page]

the time of filing of the indictment, Flores was a fugitive. In February 1976, Flores was successfully extradited from Spain, where he had been arrested by the Spanish authorities in March 1973, to the Southern District of New York.* The Spanish order of extradition provided that he was to be prosecuted only for acts that occurred after September 3, 1970, which was the effective date of the applicable treaty of extradition, and before April 30, 1971, which was the date when, according to the indictment, the conspiracy terminated.

Prior to the date originally set for trial, Flores moved to suppress as evidence against him any evidence of the acts and declarations of the defendant or his conspirators made prior to the effective date of the treaty, September 3, 1970, or after the end of the conspiracy as alleged in the indictment, April 30, 1971. In a memorandum decision dated March 24, 1976, and more explicitly at pretrial conferences held on April 13, April 19 and April 22, 1976, the District Court ruled that while statements made by Flores prior to September 3, 1970, would be admissible for the limited purpose of demonstrating Flores' knowledge and intent, statements and acts of co-conspirators prior to that date would be inadmissible. The Government appealed the District Court's ruling prospectively precluding testimony, under Title 18, United States Code,

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United States v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974). Others among the defendants have been acquitted or pleaded guilty, and still others remain fugitives. A superseding indictment, 73 Cr. 986, was filed on October 24, 1973. However, since Flores' extradition was sought on indictment 73 Cr. 19, he was tried on that indictment.

* Flores remained in custody in lieu of three million dollars bail awaiting trial on this indictment following his arrival in New York.

Section 3731. On July 9, 1976, this Court reversed Judge Bonsal's pre-trial order precluding testimony, stating that: ". . . the relevant pre-September 3rd acts and statements of both Flores and his alleged co-conspirators are therefore admissible . . ." *United States* v. *Flores*, 538 F.2d 939, 945 (2d Cir. 1976).

Trial commenced before Judge Bonsal on August 17, 1976. On August 26, 1976, the jury found Flores guilty. Flores was remanded pending sentence.

On November 3, 1976, Judge Bonsal sentenced Antonio Flores to a term of imprisonment of twenty years and fined him $20,000.

Antonio Flores is in custody pending this appeal.

Statement of Facts

The Government's Case *

A. Synopsis

The Government's evidence, presented through the testimony of eleven witnesses and approximately 40 exhibits, established that from August 1, 1968, and continuing past September 3, 1970, until April 30, 1971, Antonio Flores was the purchaser of approximately 600 pounds of pure heroin, valued at about $65,000,000 im-

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* The facts underlying the conspiracy of which Flores was a part have already been described at length in previous opinions of this Court. *United States* v. *Santana*, *supra*, 503 F.2d at 711-13; see also *United States* v. *Hysohion*, 439 F.2d 274, (2d Cir. 1971).

ported from the South of France to New York. The heroin was smuggled primarily by a French writer and a French entertainer who concealed it in large musical amplifiers and the cars of unsuspecting women whom they seduced.

Flores' initial source was Edouard Rimbaud. Later, after Rimbaud's arrest in March 1969, Flores met directly with the Corsican heroin source and relied thereafter primarily on Edmond Taillet as a courier. Both Rimbaud and Taillet testified for the Government. Their testimony was cororborated by nine other witnesses.

B. Flores makes the heroin connection.

During 1968, Edouard Rimbaud, a French citizen living in France, corresponded with Joseph Lucarotti, who was serving a sentence in the Atlanta Federal Penitentiary. The correspondence was innocent until Lucarotti asked Rimbaud whether he had a source for heroin. In particular, Lucarotti wrote that while in prison he had found both a Nev York buyer, then unnamed, and a prison confederate, Ralph Santana, to aid in the enterprise. Rimbaud wrote that he had a heroin source but no money with which to purchase it. Lucarotti therefore told Rimbaud that Ralph Santana's wife, Lillian, would meet him in Montreal and give him $16,000 for a kilogram of heroin. (Tr. 51-56).* In July 1968, Rimbaud went to Montreal to meet Lillian Santana and did receive $16,000. (Tr. 58-60).**

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* Citations to "Tr." refer to the trial transcript; "GX" refers to Government's Exhibits.

** With Lillian Santana in Montreal was Delia Burgos, who was introduced by Lillian as "the buyer's wife" (Tr. 58-59). At that time, Rimbaud still did not know Burgos was Flores' comon law wife, but he learned later. (Tr. 81).

In France, Rimbaud's partner, Felix Olivie, located five kilograms of heroin and Gilbert Bordure, a trusted courier to transport the heroin to Montreal. Rimbaud left France again to await Bordure's arrival in Montreal. (Tr. 61-62). However, when Bordure cleared customs in Montreal, he told Rimbaud that he had discarded the heroin on the floor of an airport toilet because he thought he was being watched and "it is better to lose the merchandise than for me to go to jail." (Tr. 63-65).

Rimbaud then flew to New York to explain the loss. (Tr. 65). At the Bronx Park Motel, on August 4, 1968, he told Lillian what had happened. (Tr. 65-67, 72-76, GX 1, 2). She said, "we will have to talk to Antonio [Flores]"* (Tr. 77). When Rimbaud met Flores a few days later, he told Flores of the loss.** Together Rimbaud and Flores tried to find a way to continue the business, and agreed that Rimbaud would provide five kilograms of heroin on consignment in France, rather than in Canada or the United States. (Tr. 85-86).

C. Flores travels to France to receive the heroin

Rimbaud returned to France. When in September 1968 Felix Olivie informed Rimbaud that he had procured the heroin, (Tr. 87-90), Rimbaud summoned Flores, and Flores traveled to Paris with two of his men, John

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* Lillian Santana did not then mention Antonio's last name. In fact this was the first time Rimbaud heard even his first name. (Tr. 77).

** Rimbaud testified that they had some difficulty communicating because Rimbaud's "English was not very good" but that he and Flores would "repeat the same sentences several times" and pass notes because Rimbaud "could read English much better." (Tr. 80-81).

"Buggy" Brown and Herman Rivera and a business associate, Angel Morales. Brown and Rivera were expected to smuggle the heroin from France to New York. (Tr. 90, 95-97; GX 7).

Rimbaud met Flores in Paris at the Hotel Tremoille but told Flores, despite his earlier message, that the heroin was not yet ready. (Tr. 97-99, 492-501; GX 7, 8-C, 16, 18). Flores, Rivera and Brown waited and waited until finally, short of funds, they went to the less expensive southern French provinces. In Avignon, Rimbaud finally gave Flores "two miserable kilos" of heroin. (Tr. 99-102). Flores, having anticipated five kilograms, became so furious at the reduced shipment that Rimbaud was "unnerved." (Tr. 103). Flores, displeased, left Avignon; Rivera and Brown subsequently returned to New York via Boston. (Tr. 104).

Terry Paul Jones was working at the time for Robert Martinez at a New York cab company. (Tr. 425). When Rivera arrived in Boston, he telephoned Jones ordering him to locate Flores. (Tr. 429). When Jones found Flores, he was further instructed by Flores to travel to Boston with Martinez to "pick up" the heroin from Rivera and Brown. (Tr. 430-32). Flores gave Martinez and Jones cash for the Eastern Shuttle flight. (Tr. 432-33).

At Logan Airport in Boston just a few hours later, Rivera and Brown, who were apparently afraid to travel with the heroin, told Martinez where they had stashed it. (Tr. 434). Upon finding the heroin, however, Jones and Martinez noted that there were only three packages when they had expected four. Jones caught Rivera already aboard a shuttle flight soon scheduled to leave for New

York and feverishly asked him why there were only three packages. Rivera explained that one package had broken so they had consolidated the heroin into three packages. Jones and Martinez subsequently returned to New York and delivered the heroin to Flores (Tr. 433-34). Flores asked Jones the following day whether Jones "thought that they [Rivera and Brown] had tapped [taken heroin out of] one of the bags, one of the pounds." (Tr. 436-7). Jones told Flores to draw his own conclusion.* (Tr. 437).

D. Rimbaud locates a larger heroin source, the "Corsicans"

Nothing happened until October or November 1968. During the interval, which Rimbaud described as a "dead

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* Jones originally sought out the Government in March of 1969 although he had not been arrested and was not under indictment or even under suspicion at the time, stating that he wanted protection from Flores (Tr. 427, 428). In exchange, he agreed to testify before the Grand Jury against Flores in July 1969. (Tr. 468). Jones, however, became dissatisfied with the proffered Government protection after he testified and therefore turned to Flores and his attorney Howard Diller, Esq. Diller told Jones he would pay him $5,000 not to testify at trial (Tr. 480) and Flores threatened to harm him if he did. (Tr. 482). Jones accordingly signed a statement drafted by a second attorney, Jerry Feldman, Esq., after Feldman told him, "If you copy this statement, Tony Flores won't kill you". (Tr. 478). Jones signed because he was "scared to death." (Tr. 482). As he testified at trial, the statement was patently false. It stated, "I repeated much of what the *arresting* officers stated that I should say [in the Grand Jury] in order for me to get the *best break on the case that they had against me*". (Flores XB). However, as already stated, at the time of Jones' Grand Jury appearance in July 1969, he had not been arrested and there was no pending case. During Jones' cross-examination, defense counsel sought to impeach Jones by the use of this signed statement and thus adduced the circumstances not only of the extorted bogus statement but also Jones' conversation with Diller and Flores. (Tr. 441-44, 468, 471-74, 478-80).

point," Rimbaud located two producers of heroin in France named Jean Baptiste Croce, "Bati" and Joseph Mari, "Frise". (Tr. 105-08). Rimbaud told the Corsicans, as he called them, that "we lost a golden deal" because of Olivie. (Tr. 108). Croce said, ". . . all that is the past. With us the business is going to grow bigger". The Corsicans told Rimbaud they would send twelve kilograms of heroin to Montreal through a courier, Edmund Taillet, a well known television and recording artist. (Tr. 110-12).

E. Flores decides to purchase heroin again from Rimbaud

On January 14, 1969, Rimbaud arrived in New York and contacted Flores. (Tr. 114; GX 10). He told Flores he was expecting twelve kilograms of heroin to arrive in Montreal and was now, unlike before, "working with very serious people." (Tr. 114). Flores and Rimbaud agreed upon a price of $10,000 per kilogram. (Tr. 126, 130-31). Rimbaud then flew to Montreal to await Taillet and the heroin. (Tr. 132).

Taillet, as instructed by Croce, had secreted twelve kilograms of heroin in musical amplifiers and smuggled them to Montreal. In Montreal, Taillet, who easily passed autograph-hungry Canadian customs officers, delivered the amplifiers and their contents to Rimbaud. (Tr. 133-35, 531-32).

Rimbaud notified Flores, who later met him at Montreal's Laurentian Hotel. (Tr. 135). The heroin was delivered to Flores in two installments with Flores returning to New York with the first eight kilograms and then returning to Montreal to receive the remainder. On neither occasion did Flores himself carry the heroin

into the United States. (Tr. 137, 139). Rimbaud, who had received $125,000, returned to the south of France after depositing the money in a Swiss bank. (Tr. 139).

In February 1969, Taillet was asked again to carry heroin to Montreal secreted in the equipment of a famous bandleader, Johnny Holliday. (Tr. 532-34). In March, Taillet arrived in Montreal. Although he was to deliver the heroin to Rimbaud for delivery to Flores, while waiting in Montreal Taillet saw Rimbaud on television during the evening newscast; Rimbaud had been arrested in New York on narcotics charges. (Tr. 535). Taillet then delivered the heroin to a Guido Rendel, a replacement for Rimbaud. (Tr. 141-44, 535-39).

Rimbaud had come to New York prior to his scheduled rendezvous with Taillet in Montreal in March 1969. (Tr. 142-44; GX 11). Rimbaud sent Flores a telegram, inviting him to Rimbaud's hotel. (Tr. 144). However, on March 9, 1969, Rimbaud was arrested and incarcerated at the West Street Federal Detention Headquarters (hereinafter "West Street") before Flores responded to the telegram.* (Tr. 144).

F. Rimbaud arrested, Flores seeks a new "connection"

While in West Street, Rimbaud saw Flores, who, upon responding to Rimbaud's telegram, had also been arrested. Flores told Rimbaud, "I am going to be free, I want to continue the business. Give me the French connection." (Tr. 159). Rimbaud in jail told Flores that this was not

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* Although the circumstances of the arrest were not discussed in the trial, a more complete discussion of the facts can be found in *United States* v. *Hysohion*, 439 F.2d 274 (2d Cir. 1971).

the time to speak of such things, "We will talk about that later." (Tr. 151). Flores sought Rimbaud's trust and told him that he would send a lawyer whom Rimbaud could trust, Flores' own uncle. (*Id.*).

Flores was soon released. Horacio Quinones, a criminal defense lawyer and Flores' "uncle",* visited Rimbaud at West Street and told Rimbaud that Flores wanted to know who the French connection was. Rimbaud refused. (Tr. 152-55).

Rimbaud wanted to get out on bail, to return to France and continue trafficking in heroin. Quinones, contrary to prison regulations and at Rimbaud's request, smuggled letters out of West Street for Rimbaud addressed to a Frenchman named Jean Dieupart. (Tr. 155-56). By these letters Rimbaud attempted to arrange through Dieupart the importation and sale of heroin in New York. However, the plan failed.**

G. Flores meets the Corsicans

After repeated requests by Quinones for the name of the French connection, Rimbaud complied. (Tr. 157).

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* Flores uses the term "uncle" and "brother" somewhat loosely, referring in this instance to Horacio Quinones and on a later occasion to Anthony Segura. (Tr. 571).

** For a more complete discussion of this attempt see *United States* v. *Hysohion, supra,* 448 F.2d at p. 16. The court in that opinion expressed disbelief that the attorney for Rimbaud's co-defendant smuggled out the letter which arranged for the heroin importation. The court's view proved correct as it was Quinones, Rimbaud's lawyer, who carried out the letters to Dieupart. For his role, Quinones was in fact tried, and convicted and the appeal affirmed while Flores was a fugitive in Spain. *See United States* v. *Santana, supra.*

Accordingly, in June 1969, Flores filed a new passport application (GX 7) stating that his common law wife had "burned it [the old passport he used on the September 1968 Paris visit] down the incinerator." Four days after Flores' new passport issued, Flores and Quinones arrived in Paris and registered at the Elizabeth Hotel. (GX 12). Flores and Quinones met first with Dieupart and then with the Corsicans.* (Tr. 159-60). Then Taillet received a call from the Corsicans asking whether they could visit his apartment, to which Taillet assented. (Tr. 543). Once at his apartment, Croce and Mari said "we have to introduce you to the new person who will be in charge of taking the heroin in New York." With Taillet's permission, they brought Antonio Flores into Taillet's apartment. (Tr. 545). In Taillet's presence they discussed the price and purity of the heroin. Flores on a New York map showed Taillet where they would meet to give him money for the Corsicans. (Tr. 547).

H. Flores receives heroin from and pays money to Taillet on a number of occasions before the spring of 1971

Shortly after Flores visited Paris, Taillet went to New York to recover $150,000 from Flores. Taillet returned to France with the money and gave it to the Corsicans. (Tr. 549-58; GX 12, 13).

Taillet had previously travelled to Montreal expressly to seduce a woman named Noella Richards as part of a plan whereby Taillet would convince her to visit France

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* Quinones visited Rimbaud at the West Street prison sometime after the June 1969 trip and told Rimbaud that both he and Flores had been to France to meet Dieupart. On a later occasion at West Street, Quinones told Rimbaud that Flores had personally met the "Corsicans". (Tr. 159-60).

with her large car. (Tr. 541-42). After returning to France with Flores' $150,000, Taillet invited Noella and her car to France. (Tr. 564-65). One evening following her arrival in Paris, Taillet borrowed her car and the Corsicans, unbeknownst to Noella, loaded it with twenty-seven kilograms of heroin. (Tr. 565). At the conclusion of Noella's holiday, Noella and her heroin-laden car safely returned to Canada. Taillet then left for Montreal to invite Noella (and her car) to New York for a weekend. The unsuspecting Noella drove her car to New York and Taillet flew ahead to meet her. (Tr. 565-68).

On July 29, 1969, Taillet registered at the Edison Hotel to await Noella's car. By telephone, he learned it had safely passed the Canadian border. (Tr. 568-71, 573-74; GX 14, 14A, 16). That evening, in a Mercedes, Flores introduced Taillet to Tony Segura stating, "This is my brother and my partner and every time you will not see me you will see him and you can trust him." (Tr. 571). After Noella arrived, Taillet delivered the car to Segura. (Tr. 577; GX 15). Taillet and Segura then unpacked the car themselves. (Tr. 578-85). They suffered one mishap, a damaged bag, at which point Segura observed. "I don't believe we will be able to sell this. But I have to talk to Antonio about it." (Tr. 585). Segura paid Taillet, who left for Paris. (Tr. 585-88).

Taillet testified that between the Noella Richards incident and the Spring of 1971 he made several other trips to New York. On approximately three of these occasions he delivered heroin to Flores via Segura. (Tr. 593-96, 599-601, 611-17; GX 20).* On only one trip did Flores

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* The cars in those instances were delivered by both those who were aware of the heroin contents, as in the case of Jean Pierre Buffat (30 kilograms) and Roger Du Buis (30 kilograms), and unaware as in the case of Ginette Le Marque (50 kilograms) who, like Noella before her, was merely an unsuspecting courier seduced by Taillet.

have any complaint when he told Taillet the heroin was "difficult to sell because it was no good" and gave Taillet a heroin sample for the Corsicans to test. (Tr. 605). Taillet was paid on approximately four occasions in, among other places, St. Patrick's Cathedral. (Tr. 596, 603-04, 605-06, 618A).

I. In April 1971, Flores receives his final and largest shipment

Taillet's final trip occurred in the Spring of 1971. Taillet was asked to go to New York to pick up the keys to a car that someone named Mosca was supposed to take to New York. Taillet was to deliver the keys and describe the location of the car to Segura, and then pick up one million dollars as payment for the 100 kilograms of heroin hidden in the car. (Tr. 620-621).

A pale blue Citroen was registered in France in March of 1971. (GX 22). After the car was packed with 93 kilograms of heroin, it was placed aboard the Covadonga, a Spanish ship traveling from Spain to Mexico via Puerto Rico. On April 30, 1971, the several people accompanying the car received entry visas in Texas, and then drove the heroin-laden Citroen from Laredo, Texas to New York. (Tr. 630-31; GX 26, 26a, 27, 27a, 28, 28a, 29, 29a).

Mosca, once in New York, found Taillet, told him of their trip, and handed over the necessary papers. (Tr. 628; GX 30). Taillet repeatedly but unsuccessfully searched for Flores or Segura at the usual point of rendezvous. (Tr. 628). Finally on April 12th or 13, Taillet found Segura and informed him "I have a French car with 100 kilos inside." Satisfied, Segura received the garage ticket for the Citroen at the Penn Garden Hotel. (Tr. 668-69).

However, when Segura unloaded the heroin he could not find approximately twenty of the one hundred kilograms in the car. Segura therefore told Taillet ". . . that Antonio was not happy because 20 kilos of heroin were missing." (Tr. 669). Segura said further, "We have to go and talk with him . . . I have to take you somewhere." (Tr. 670).

Segura then drove Taillet to meet Flores. At first, Taillet could not recognize Flores since "he had changed a lot. He had lost weight, he had a little beard, and it seemed that he had plastic surgery on his face." (Tr. 670).* Nevertheless he recognized "Antonio." (*Id.*). For a time, Segura and Flores huddled alone speaking, as best Taillet could hear, in whispered Spanish. Then Flores told Taillet, "It will be okay, tonight Anthony [Segura] will give you money." Then they asked Taillet "where the 20 kilos which were missing could be." Taillet replied that he did not know, but explained that "the heroin was under the front part of the floor of the car, the back part of the floor, under the back seat, and inside the trunk." (Tr. 670-71).

Taillet later helped Segura remove six screws located under the rear back seat of the Citroen. Segura extracted

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* A comparison by the jury of Flores' picture affixed to the June 1969 passport application (GX 7) with the picture affixed to the May 1971 falsified "Serrana" passport application (GX 38) allowed them to note clearly the change in Flores' physical appearance even absent the change in facial hair Taillet observed. Taillet testified that while Flores appeared to have had plastic surgery in April 1971, he could detect none as he looked at him during the trial. (Tr. 856). Although Flores in his brief at 10 states that the Government "admitted before the judge only [sic] that Flores did not have plastic surgery," that is not the case since the Government was simply not in a position by training or investigation to represent whether Flores had had plastic surgery or not.

40 bags of heroin, spilling some as he did it.* (Tr. 672-80, 682-84; GX 18, 25A, 25C-G).

After Segura received the heroin he paid Taillet the first installment, $370,000 in cash. (Tr. 684-85). Taillet counted the money and then he and Mosca divided it into two valises. (Tr. 690-93; 696-97; GX 36). Mosca left for France with the $370,000 just two days before Taillet's arrest on April 28, 1971. (Tr. 706). Taillet registered at the Abbey Victoria Hotel on April 25, 1971. (GX 35). Shortly afterwards, on April 27, 1971, he met with Segura to be paid the rest of the money. They met in the hotel lobby. Segura told Taillet he would be paid the next day. (Tr. 708-709). Taillet was arrested before the next meeting, and still had in his possession the piece of paper that he and Mosca had used to tabulate the $370,000. (Tr. 709; GX 36). No heroin was recovered.

Less than a month following Taillet's arrest, Flores applied for a new passport in the name "Luis Serrano" claiming that his occupation was "florist." (GX 38). Flores then fled to Paris. Subsequently, while in Europe,

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* The car was sold in April 1971, before Mosca left New York, to Kurt Bass, then a Manhattan car salesman, as reflected by the French registration (GX 22), $640 purchasing check (GX 23), and bill of sale (GX 24). (Tr. 886-90). Mr. Bass testified that when he bought the car it was explained that the ripped carpet glued to the floor board in the back of the car was a repair required as a result of vandalism at their port of entry in Mexico. (Tr. 891). On May 7, 1971, Special Agent Robert Preziosa picked up this car from Bass and on May 10, 1971, personally examined it. (Tr. 894-95). Preziosa discovered that beneath the glued carpeting in the back seat there was a removable metal plate. (Tr. 895-99; GX 25A, 25E, 25F, 25G). Behind it, Preziosa saw traces of a white powder (Tr. 899), that a customs chemist, James John Chap, brushed into an envelope and subsequently analyzed as heroin hydrochloride. (Tr. 915-25; GX 251, 25J, 25H).

he purchased or stole a French passport in the name Casimir Ducados, which was found hidden under a chair in his hotel room when the Spanish police arrested him in March 1973.* Finally, when Flores was being brought back to the United States in January of 1976, after having been advised of his rights by Special Agent John O'Neill, he said, according to O'Neill, "it was lucky that we had caught him when we had because if we hadn't caught him then he was getting ready to leave Spain. He was going to leave Spain, go to France, to England, Japan, and then finally go to South Africa; and reside in South Africa. As he passed through each country he would change his identity." (Tr. 1040-42).

The Defense Case

Flores called George Alvarez, who corroborated Taillet's statement on cross-examination that during a previous trial, after first identifying Alvarez he withdrew his identification because he decided he could not be sure. (Tr. 1057-60). In that trial, the identification and the correction occurred entirely during Taillet's direct testimony. (Tr. 1062).

The defense also called Anthony Segura, who testified on direct examination that Flores was not a part of the

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* On Flores' person at the time of his arrest, according to Juan Alvaro Lara, the arresting Spanish police inspector, was his American "Serrano" passport. (Tr. 946-47; GX 43). Inspector Jose L. Cano, who with others subsequently conducted the search of Flores' hotel room, found not only the Ducados passport (GX 44A) but also Spanish credit cards in the name of Ducados (GX 44d, 44E) and a calling card for a Jean Pierre Buffat of Lyon, France (GX 44F), all in a single leather wallet (GX 44) hidden under the leather cushion of a chair in the room. The Buffat calling card is significant if one recalls that Buffat had been responsible for delivering a car containing 30 kilograms of well-concealed heroin. See p. 12 at n.*, *supra*.

conspiracy for which Segura had previously been convicted. (Tr. 1074). However, during cross examination he admitted that he had dealt with Taillet prior to April 1971, and indeed had done so in the summer of 1969. (Tr. 1078). Segura also conceded that only one month after Taillet's arrest, he had used the name Wilfredo Valentin to apply for a passport. (Tr. 1079; GX 396). He further admitted that he used that "Valentin" passport to meet Flores in Paris in June 1969. (Tr. 1082).

ARGUMENT

POINT I

Flores Cannot Relitigate Issues Decided Adversely to Him on a Prior Appeal.

Despite this Court's prior decision directly to the contrary, *United States* v. *Flores*, 538 F.2d 939 (2d Cir. 1976), Flores still contends that the Government could not introduce evidence of Flores' conspiratorial role prior to September 3, 1970, because of the terms of the Spanish Court's extradition decision. This Court expressly held that the Spanish Court's decision predicated upon the Geneva Convention placed a time limitation only on the *crime* for which Flores could be prosecuted by the United States; Spain could not and clearly did not intend to place limits on the *evidence* that the United States might adduce in proving the commission of the crime. 538 F.2d at 943.

Although Flores mentions in passing that he considers this Court's decision in *Flores* to be wrong, Brief at 19, he does not seriously reargue the merits of his position. Thus, under the law of the case doctrine, the issue is foreclosed from further litigation. *United States*

v. *Furey*, 514 F.2d 1098, 1102 (2d Cir. 1975); cf. *Jhirad* v. *Ferrandina*, 536 F.2d 478, 483 (2d Cir. 1976), *cert. denied*, — U.S. —, (1977); *United States* v. *Fernandez*, 506 F.2d 1200, 1203 (2d Cir. 1974) (law of the case doctrine is discretionary, and the Court may reconsider issues if new material or argument is offered).

The only new material Flores presents to this Court on this issue is a post-trial diplomatic note from the Spanish Embassy dated September 29, 1976, (A. 72-73), that, he asserts, represents a new "protest" by Spain about this country's treatment of Flores. For two reasons, this material is of no force whatsoever in considering (or reconsidering) the merits of Flores' claim.

First, the panel in the original *Flores* appeal already considered two letters of like nature submitted by Flores and found them insignificant. 538 F.2d at 945 n.4.*

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* At the time of the prior appeal, Flores presented two letters from the Spanish Council General in New York and represented them to be formal notes of protest. (A. 85, 86). Neither letter, as Flores now concedes, was a formal letter of protest. Brief at 20. The Government therefore correctly labelled those communiques as "unofficial letters prompted by Flores' family," a characterization adopted by this Court. 538 F.2d at 945, n.4. At the time of the appeal there had been an exchange of formal *notes* between the United States and Spain. The Government did not construe the exchange as a protest because the initial inquiry by Spain appeared to be based on a misunderstanding of evidentiary matters then pending before the District Court. Nevertheless, at oral argument in the prior appeal, the Government distrbuted certified copies of notes, both from Spain (A. 70-71) and the State Department, to the members of the panel. The State Department's response assured the Spanish Embassy that the extradition order had not in any way been derogated:

> ". . . it is evident that Mr. Flores is not being prosecuted for activities prior to September 3, 1970, but the prosecution

[Footnote continued on following page]

Second, the new letter itself is clearly not probative of the proposition asserted by Flores. Flores claims that the Spanish authorities have concluded that the United States has incorrectly interpreted the Spanish extradition decree with respect to the issue of whether evidence preceding the September 3, 1970, date is admissible at trial—the very issue decided in favor of the Government by the prior panel. See Brief at 20-23. In the first sentence of the second paragraph of the letter, however, the Embassy specifically notes that it was *not* addressing itself to this issue. (A. 72). Rather, as the rest of the paragraph makes clear, "based upon documents in its

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has offered and the Court has accepted, evidence of Mr. Flores' illegal activities prior to that date to show his guilty knowledge and intent with respect to illegal acts committed subsequent to September 3, 1970.

It is the view of the Department of State that the use by the District Court of this evidence for the purpose indicated does not constitute detention, trial or punishment of Mr. Flores for activities prior to September 3, 1970, for purposes of Article XIII of the Treaty on Extradition between the United States of America and Spain signed at Madrid on May 29, 1970, and is consistent with the judicial decree from the Audiencia Territorial of Barcelona."

Because there was no further correspondence from the Spanish Embassy prior to Flores trial, both the State Department and the United States Attorney persisted in the belief that the Spanish note was based upon an incomplete record, as previously assumed, and did not constitute a protest.

Only on September 29, 1976, a month after the trial, was another note forwarded by the Spanish Embassy (A. 72-75). As noted in this brief, this communication appeared to suffer from a similarly insufficient factual basis as it alleged the jury had been charged based on the indictment running forward from 1968. The State Department responded to this last Spanish communique on March 1, 1977, to correct the apparent error: "The jury was not asked to bring a verdict on the indictment which charges Flores with acts committed prior to the period covered by the extradition order." The Government intends to supplement this record on appeal with copies of both State Department responses, which Flores somehow has failed to include in his appendix.

hands" the Embassy concluded that the trial judge did not charge the jury that they could consider pre-September 3, 1970, evidence only for its limited evidentiary purpose. This issue, of course, whether the District Court properly carried out the order of this Court, see 538 F.2d at 945 n.5, that the jury be advised of the limited significance of the early testimony—a point separately argued by Flores to this Court, see Brief at 24-32—is particularly within this Court's rather than the Spanish Embassy's, competence to rule. Indeed, given the thoroughness with which Judge Bonsal charged the jury on just this issue, see Point II, *infra*, the only reasonable conclusion is that "the documents in its [the Embassy's] hands" were insufficient to apprise the Spanish Embassy of the true facts.*

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* In his brief at 20, Flores makes the conclusory and implausible statment that the Spanish Embassy wrote the September 29, 1976, letter only afer "translating and reviewing the entire trial transcript." However, there is simply no support for this description of what apparently was an *ex parte* communication with the Embassy by or on behalf of Flores. We submit it is crystal clear that the Spanish authorities were insufficiently informed of the true manner in which the jury was instructed. Frist, the letter itself quotes only from that portion of the charge in which the trial judge read from the indictment, although, as we demonstrate in Point II, *infra*, on every occasion he tempered the words of the indictment, read on this one occasion, with the instruction that the events prior to September 3, 1970, were of limited significance. Further even as the District Court read the dates from the indictment on this one occasion he stated, that there was "nothing magic about those dates [in the indictment]." (Tr. 1191). Second, we point out that Flores' brief on this appeal is extraordinarily misleading with respect to the number of times and the thoroughness with which the trial judge instructed the jury on this issue. Indeed, if one were to rely on Flores' brief and not have access to the record—disabilities under which this Court fortunately does not labor—one would believe that Judge Bonsal only raised the issue in a superficial and confusing manner when in fact he did so in depth and with clarity on several occasions. If Flores or those acting on his behalf made the same representations to the Spanish authorities, it is clear that the Spanish authorities were egregiously misled.

POINT II

The District Court Properly Instructed the Jury in Accordance with This Court's Opinion.

Flores claims, Brief at 23-32, that Judge Bonsal erred in not instructing the jury "of the distinction between evidence of any earlier conspiracy and the offense charged against Flores," in accord with the explicit mandate of this Court's prior opinion, *United States* v. *Flores*, *supra*, 538 F.2d at 945 n.5. His claim is without basis in fact, and indeed his statement that a limiting instruction appearing on page 122 of the transcript "was the trial judge's only attempt to comply with the order of the Second Circuit Court of Appeals during the trial," Brief at 25, is simply a gross distortion of the record. In fact, as the record demonstrates, both counsel and the District Court properly advised the jury on numerous occasions in precise conformity with the *Flores* decision.

Before a jury was even impaneled, on August 17, 1976, Judge Bonsal instructed those assembled for jury selection:

> "And the jury here will have to find . . . that the defendant did engage in a conspiracy to violate these laws in the period between September 3, 1970 and April 30, 1971."

Shortly after the jury was selected and during the defense opening, prompted by the assertion of defense counsel that "Mr. Flores is charged here with acts that took place between September 3, 1970 . . . until April 30, 1971" (Tr. 41), the District Court reinforced that assertion by instructing the jury again, "you must find that there was a conspiracy here and that he [Flores] was a member of it on or after September 3, 1970 and before April 30, 1971." (*Id.*). The Court instructed

the jury that it would hear substantial evidence concerning events prior to that date and that he would provide more instructions about that later. (*Id.*)

During the testimony of the first Government witness, the Court did provide further instructions. Edouard Rimbaud's testimony was entirely devoted to events prior to September 3, 1970. The District Court instructed the jury that Rimbaud's testimony as well as other evidence concerning events prior to September 3 was merely before the jury as "background information" and the jury should understand "that the crime for which Mr. Flores is charged here, this conspiracy, is for this later period, September 3, 1970 to April 30, 1971." (Tr. 122).

The Court then rejected Flores' claim that "Every time . . . one of these conversations, one of these events [prior to September 3, 1970] takes place we say every time there should be a limiting instruction." (Tr. 116). Nonetheless, there followed a string of objections by counsel for Flores, the sole purpose of which was to direct the jury's attention to the fact that the testimony concerned events before the September 3rd date. (Tr. 433, 526, 565, 570, 587, 943, 946, 948, 960).

Next, when the Court outlined its charge to the jury at a conference in chambers, Flores made no objection either to its form or its substance. (Tr. 1105-06).* The

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* On page 30 of his Brief, Flores claims that "[t]he prosecutor also admitted that the charge to the jury was defective." This assertion is not only characteristically misleading, but, as a simple reading of the quoted portion of the transcript reveals, actually demonstrates the thoroughness with which Judge Bonsal instructed the jury of the limited significance of the pre-September 3, 1970, events. As the transcript shows, the prosecutor requested that the jury be charged that "they *could* consider the existence of the conspiracy prior to September 3, 1970," (Tr. 1217; emphasis added); quite clearly the prosecutor's concern was that after the repeated admonitions to the jury of the limited significance of these events they might believe that they could not consider them *at all*.

charge actually given to the jury rewarded Flores' confidence. The District Court first impartially marshalled the evidence without any "undue emphasis" on events prior to September 3, 1970. (Tr. 1184-86). The Court then accurately stated the Government's contention that Flores remained a member of the conspiracy from 1968 continuing past September 3rd (Tr. 1187) and Flores' contention that there might have been a conspiracy "but he denies absolutely that he had anything to do with it and he denies particularly that, if there was a conspiracy, that he was a member of it at any time between September 3, 1970 and April 30, 1971.* (Tr. 1189-90). The Court then reiterated that the jury could only convict if Flores was found to be a member of a conspiracy that continued after September 3, 1970, and then repeated that instruction again. (Tr. 1193-94). After reviewing the testimony during the relevant period following September 3rd (Tr. 1194-95), the Court set forth the three elements necessary to convict Flores: (1) that a conspiracy existed and continued after September 3rd; (2) that Flores became a member and continued as a member after September 3rd; (3) that one overt act occurred after September 3rd. (Tr. 1195-96). The Court fully discussed each of these three elements. (Tr. 1198, 1189, 1201-3) and then summarized them once again. (Tr. 1203).

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* During Flores's summation, the relevant period was similarly emphasized (Tr. 1150). Flores claimed that during the relevant period there was only one incident, the 100 kilogram transaction in April 1971, after September 3, 1970 (Tr. 1167), and attacked the credibility of the one Government witness, Edmond Taillet, who described that event. (Tr. 1161-62). By challenging Taillet's version of the events, Flores therefore claimed that the Government "didn't prove anything about Mr. Flores from September 3, 1970 to April 30, 1971. It just isn't there," and argued Flores should be acquitted. (Tr. 1152).

In short, quite contrary to the outrageous misrepresentations contained in Flores' brief, the jury was adequately—indeed, repeatedly—charged in complete compliance with this Court's decision.*

POINT III

There Was No Prosecutorial Misconduct.

In a vain and scattergun attack, Flores raises several claims of the prosecutor in this trial mishandling himself to such a degree that the conviction must be reversed. Without exception, the events to which Flores now refers were proper. Further, as revealed in many instances by Flores' total failure to object at trial, Flores himself deemed the statements inconsequential. When viewed against the applicable law in this Circuit—to which Flores studiously does not advert—the claims are entirely frivolous.

A. The prosecutor did not place the defendant's character in issue.

Flores contends that the admission of certain evidence by the trial court thereby placed Flores' character in issue.

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* Flores improperly attempts to buttress his argument by referring in his brief to interviews with jurors about the effect of the judge's charge. Brief at 32. This attempt should be rebuffed, and indeed castigated, for three reasons. First, the remarks in the brief find absolutely no support in the record, and apparently are merely secondhand, unsworn reports of *ex parte* meetings. Second, this Court has already noted that such attempts to interview jurors with a view to impeaching a verdict, especially when done as here without prior judicial approval, are "reprehensible." *United States* v. *Brasco*, 516 F.2d 816, 819 n.4 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975). Finally, Fed. R. Evid. 606(b) emphatically precludes the use of such post-trial statements by jurors for these purposes.

Flores further complains that, during his summation, the prosecutor not only read this portion of the transcript to the jury but also on four other occasions during both the opening and the summation otherwise placed the defendant's character in issue by his remarks. (Br. 33-35).

The evidence admitted by the trial court consisted of Rimbaud testifying to Flores' reaction on August 4, 1968, upon learning that their very first heroin transaction had been frustrated because Gilbert Bordure had double crossed Rimbaud. Flores offered to have someone "cut Gilbert's throat." (Tr. 82).

It is clear the trial court properly admitted this evidence. This was not evidence of Flores' character. To the contrary, the testimony evidenced the existence of the conspiracy and Flores' intent and purpose at its very outset. *United States* v. *Flores*, 538 F.2d 939, 945 (2d Cir. 1976); see *Grunewald* v. *United States*, 353 U.S. 391, 396-97 (1957); *United States* v. *Cioffi*, 493 F.2d 1111, 1115 (2d Cir. 1974). Flores' reaction to being "double-crossed" demonstrated, in the context of the conspiracy, his intent to maintain tight control and to brook no interference from any quarter, with his goal, heroin importation. *United States* v. *Campanile*, 516 F.2d 288, 292 (2d Cir. 1975); *United States* v. *Bozza*, 365 F.2d 206, 213 (2d Cir. 1966). As such, this proof was necessary to describe the entire plan of criminal action. See *United States* v. *Hughes*, 441 F.2d 12, 20 (5th Cir.), *cert. denied*, 404 U.S. 849 (1971); *United States* v *Baker*, 419 F.2d 83, 86 (2d Cir., 969), *cert. denied*, 397 U.S. 971 (1970); *United States* v. *Light*, 394 F.2d 908, 912 (2d Cir. 1968).

Flores then objects to the prosecutor's reading this testimony in summation without reading the defense counsel's objection to its admission. Since defense counsel's objection, which had been properly overruled, did not constitute evidence and was otherwise extraneous, this claim

is absurd. See *United States* v. *Kuta*, 518 F.2d 947 (7th Cir.), *cert. denied*, 423 U.S. 1014 (1975). *See also United States* v. *McCoy*, 517 F.2d 41, 44 (7th Cir.), *cert. denied*, 423 U.S. 895 (1975); *Stone* v. *United States*, 506 F.2d 561, 564 (8th Cir. 1974), *cert. denied*, 420 U.S. 978 (1975).

The following three remarks in summation constitute three of the other four instances when the prosecutor allegedly placed the defendant's character in evidence:

> "The only thing [Jones] wanted when he first came to the Government was protection from that man, Antonio Flores." (Tr. 1123).
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> * * * * *
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> "Flores threatened Jones and so it was after that that Jones copied an affidavit. . . ." (Tr. 1124).
>
> * * * * *
>
> "And even today when he [Segura] took the stand he is still protecting his boss Antonio Flores and you can ask yourself why and you can see what happened to others that bucked Antonio Flores." (Tr. 1132).

No objections were made at trial to these "highly prejudicial" remarks.* This failure to object in and of itself precludes Flores from raising this frivolous claim on appeal; it obviously also reflects the insubstantiality of the remarks. *United States* v. *Head*, 546 F.2d 6, 8 (2d Cir. 1976); *United States* v. *Ong*, 541 F.2d 331, 342-43 (2d Cir. 19766); *United States* v. *Canniff*, 521 F.2d 565, 571-72 (2d Cir. 1975), *cert. denied, sub nom. Benigro* v. *United States*, 423 U.S. 1059 (1976); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402

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* Indeed, the remarks about Jones were entirely based upon and necessitated by Flores' attempt during cross-examination to impeach Jones. See p. 7, n.*, *supra;* pp. 29-33, *infra.*

U.S. 146 (1971); *cf. United States* v. *Socony-Vacuim Oil Co.*, 301 U.S. 150, 238-39 (1940).

Again, by these remarks, the prosecutor did not attack the defendant's character. As he was entitled to do, the prosecutor discussed the evidence in the record and the reasonable inferences that could be drawn from the impeachment evidence adduced about Jones by Flores and the evidence indicating Segura's motivation to lie for Flores. See *United States* v. *Steinberg*, Dkt. No. 76-1253, slip op. 2191, 2201 (2d Cir. March 7, 1977); *United States* v. *Gerry*, 515 F.2d 130, 144 (2d Cir.), *cert. denied* 423 U.S. 832 (1975). In this context, the "unflattering characterizations" of the defendant do not constitute error because they were well grounded in the record. See *United States* v. *Keane*, 522 F.2d 534, 560-61 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976); *United States* v. *Windom*, 510 F.2d 989, 994-95 (5th Cir.), *cert. denied*, 423 U.S. 863 (1975).

Finally, Flores contends that the prosecutor misled and inflamed the jury by referring both in his opening statement (Tr. 21, 25) and his summation (Tr. 1118, 1120) to the "French connection". Froles claims that these references were to the movie, "French Connection." Flores does not make clear precisely how this places his character in evidence.*

It is of some moment that the prosecutor made no reference to the movie, "French Connection." Rather, the prosecutor referred only to the generic and descriptive narcotic term "french connection" that was indeed frequently used *in haec verba* by Rimbaud and Flores to describe how the heroin was obtained. In the open-

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* Defense counsel objected on only one occasion, during the prosecutor's opening. (Tr. 21), to the use of the term "French connection." Flores has therefore waived his claims of error as to the other occasions on which this term was used. See *United States* v. *Caniff*, *supra*.

ing, the prosecutor accurately anticipated Rimbaud's verbatim testimony on this matter; in his summation,* the prosecutor quoting the very term employed—without objection—by the witnesses, repeated the term "french con-

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* The prosecutor's references in opening and summation to the "French connection" were as follows:

"The evidence will show Antonio Flores bought 600 pounds of heroin, 100 per cent pure french heroin. His French connection smuggled it . . . concealed in cars and musical amplifiers. The destination was this town, New York City." (Tr. 21).

* * * * *

"So what did Flores do? He sent two others. He sent Jones and Martinez to go collect the heroin and bring it to New York. Five kilograms of heroin lost, with $16,000 of his money. All that trouble in France and the loss of two kilos of heroin.

"Flores was fed up with his French connection.

"Months passed. Rimbaud, on the French side, discovered a new source. These men were Corsicans and they had a limitless supply of heroin." (Tr. 25).

* * * * *

"Remember those other drug deals that Rimbaud testified to on cross-examination? Those were to help him raise his bail and get out of jail. Perhaps free of Flores, but he felt cornered because Rimbaud's prison drug deals failed. He didn't get the money to get the bail. That is why he finally gave Quinones the French connection. Quinones gave the information to Tony, but Quinones wanted to be in on the kill, and he planned a trip to Europe with Flores in June of 1969. It had taken Flores, through Quinones, about three months to get the connection, but time was on Flores' side because Rimbaud was in jail." (Tr. 1118-19).

* * * * *

"Quinones came back to New York and he told Rimbaud that the connection had been made, and that he thought everything had worked out; while Rimbaud had been the French connection, the only link between buyer and supplier before his arrest, now that the buyer and the supplier knew each other, there could be several smugglers. In fact, there were several." (Tr. 1120).

nection" in discussing the evidence adduced at trial.* *See United States* v. *Caniff, supra,* 521 F.2d at 571-72.

Indeed, it was Flores alone who made repeated references to the "French Connection" as movie.** Defense counsel's first explicit reference to the movie in his opening was so surprising that it prompted the trial judge to say: "Wait a minute. Mr. Shaw, what is this about a movie?" (Tr. 39). Clearly, Flores cannot now claim, having raised the matter of a movie himself, that the prosecution's remarks about the generic narcotics term, "connection", were improper.

B. The prosecutor did not improperly insinuate corruption on the part of defense counsel in this case.

Flores contends that the prosecutor's summation as it described the criminal activities of three attorneys associated with and employed by Flores during the conspiracy was improper. The comments complained of follow:

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* The use of this term should have come as no surprise to defense counsel since it was also used in the *Santana* trial.

** Defense counsel made the following references to the movie "French Connection:"

> "He is using those words to excite you. 'French connection'. I don't think you will see Popeye and I don't think you will see Olive Oil in this courtroom." (Tr. 38).
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> * * * * *
>
> "Nothing means anything in a name. There is talk here of a French Connection and millions of dollars trying to draw your attention to a movie that was made." (Tr. 39).
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> * * * * *
>
> "And the Government came up here in the beginning of the case and I said to you there is no French Connection and you are not going to see Popeye from the movie that was here and you are not going to see—as a joke I said Olive Oil. There was no French Connection here. You didn't see the chase, did you?" (Tr. 1152).

> "His uncle, Horacio Quinones is just one of several lawyers in this case who hires himself out to do Flores' bidding, however illegal. Jerry Feldman, Howard Diller, other corrupt attorneys, we will talk more about them later." (Tr. 1118).
>
> * * * * *
>
> "Flores threatened Jones, and so it was after that that Jones copied an affidavit drafted by another attorney who thought more of Flores' money than he did of his oath to uphold the law." (Tr. 1124).

Flores contends that these references, particularly the reference to "other corrupt attorneys," were "deliberate and had the sole effect of casting doubt on the integrity of the defendant's attorney." (Br. 36). The charge is patently false. Indeed, this assertion of impropriety, as the previous charges, should be inspected with great suspicion in view, once again, of the absence of specific objection at trial to any of the prosecutor's remarks now claimed to have been so prejudicial. This failure to object constitutes a waiver of the claims and reflects their insubstantiality. *United States* v. *Canniff*, *supra*; *United States* v. *Socony-Vacuum Oil Co., Inc.*, *supra*.

Moreover, when these remarks are placed in their proper context it becomes clear that the prosecutor again simply discussed the evidence adduced at trial and the reasonable inferences drawn therefrom, as he was fully entitled to do. *See United States* v. *Steinberg*, *supra* slip op. at 2201; *United States* v. *Morell*, 524 F.2d 550, 557 (2d Cir. 1975); *United States* v. *Wilner*, 523 F.2d 68, 73 (2d Cir. 1975); *United States* v. *White*, 486 F.2d 304, 207 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

Quinones played a substantial role in the importation of the heroin involved in this case by smuggling from the imprisoned Rimbaud and mailing to Dieupart letters that arranged for an unsuccessful heroin delivery and the introduction of Flores to the Corsicans.*

Diller's and Feldman's involvement was no less substantial. However, evidence of their involvement was entirely elicited by defense counsel, not by the Government. When Jones testified at trial on behalf of the Government, the defense sought to impeach Jones on cross-examination by the use of a statement signed by Jones but drafted by Feldman. This statement was signed by Jones, but only after he had been threatened by Flores and promised $5,000 for not testifying by Diller, Feldman's employer (Tr. 441-44, 468, 471-74, 478-80).**

The prosecutor's remarks in summation, when considered in context, *United States* v. *Bivona*, 487 F.2d 443, 446-47 (2d Cir. 1973), did no more than marshall the evidence of Quinones' involvement and describe Diller's

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* For his role, Quinones was convicted and his conviction was affirmed on appeal. *See United States* v. *Santana*, 503 F.2d 710 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974).

** That Diller, as noted by Flores, Brief 37, was at one time an agent of the Bureau of Narcotics and Dangerous Drugs is not only irrelevant but also was not presented to the jury.

The admissibility of this evidence however is clear. This Court has noted on several occasions that testimony of intimidation and threats, even if hearsay, are admissible to prove a witness's state of mind, *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir.), *cert. denied*, 423 U.S. 832 (1975); *United States* v. *Cirillo*, 468 F.2d 1233 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973), and in particular to set the record straight after cross-examination had been used to give a "distorted impression of [the] witness's credibility." *United States* v. *Panebianco*, 543 F.2d 447, 455 (2d Cir. 1976); *United States* v. *Cheung*, Dkt. 76-1362, slip op. 2063, 2069-71 (Feb. 28, 1977). *A fortiori*, it is admissible when it is adduced, as here, during cross-examination by the defense.

and Feldman's attempt to impeach the credibility of Jones.*

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* The prosecutor's remarks in context follows:

"When Rimbaud said, 'This is no time to talk business,' Flores realized what he had been saying. He tried instead of demanding a connection immediately, to gain Rimbaud's trust. He offered him a lawyer. 'It is my uncle. We can trust him.' Flores uses the term 'uncle' and 'brother' pretty freely during the course of this conspiracy for the partners that he works with. Horacio Quinones and Tony Segura don't sound to Taillet or to anyone else like relatives of Antonio Flores. His uncle, Horacio Quinones, is just one of several lawyers in this case who hires himself out to do Flores' biddings, however illegal. Jerry Feldman, Howard Diller, other corrupt attorneys, we will talk more about them later."

"I have been sent by Mr. Flores, Quinones introduced himself. Tony wants the French connection. Well, Flores' trick didn't work at first. 'I am the only person who can make the link between the American group and the French,' Rimbaud said. 'But this is not the time. Try me later.'" (Tr. 1117-18).

* * * * *

"The only thing he wanted when he first came to the Government was protection from that man, Antonio Flores. Jones testified in the Grand Jury in July of 1969. These dates are important. He cooperated in March of 1969, he testified in the Grand Jury in July of 1969. Don't lose those dates in your mind. Things went sour with the Government. The protection was unsatisfactory. What was he going to do to protect himself from Flores if the Government wasn't helping him? He turned to Diller, Flores' attorney, and Flores. Angel Morales, you will recall on cross said that Diller was Flores' attorney. Diller told Jones he would pay him $5000 not to testify. Diller, that is right, an attorney told him he would pay him that money. Flores threatened Jones, and so it was after that that Jones copied an affidavit drafted by another attorney who thought more of Flores' money than he did of his oath to uphold the law.

Feldman told Jones, 'You copy this statement? Tony Flores won't kill you. Examine this affidavit.'"

[Footnote continued on following page]

The descriptions of these three attorneys were accurate and unobjectionable. *See Myers* v. *United States*, 49 F.2d 230, 231-32 (4th Cir.), *cert. denied*, 283 U.S. 866 (1931).* The prosecutor's remarks were not intended, nor can they be objectively viewed, as referring to the defendant's counsel at trial.**

It puts in Jones' mouth the following words:

"'I repeated much of what the arresting officers stated that I should say in order for me to get the best break on the case that they had against me.'"

"But Jones had not been arrested when he went before the grand jury. If Jones had written that affidavit, he would not have said, 'arresting officers.' It is clear that Feldman said, 'arresting officers.'"

"The Government had nothing on Jones before he came forward. Jones therefore would not have said, 'best break in the case that they have against me,' but Feldman said it." (Tr. 1124-25).

* Flores' reliance on *United States* v. *Burse*, 531 F.2d 1151 (2d Cir. 1976), is misplaced. In that case, the prosecutor made "improper and potentially derogatory comments" about the defendant's trial lawyer. Moreover, those comments constituted only one of eight instances of improper remarks by the prosecutor in summation in that case, which, the Court held, required reversal when considered along with the fact that the case was a close case.

Berger v. *United States*, 295 U.S. 78 (1935), quoted by Flores, is inapposite. That case involved conduct throughout the trial by the prosecutor that was "thoroughly indecorous and improper," including personally injecting himself into the case. *Id.* at 84.

** Flores refers to Diller's having "appeared in the Courtroom during the trial, on the defense and immediately before Mr. Flannery's summation." Brief at 36. That Diller "appeared in the Courtroom" may be correct. He did not, however, appear of record for the defendant and he was not identifiable to any juror since he was not pointed out and since no juror saw a picture of him during the trial. At any rate, his appearance in Court was certainly not at the request of the Government.

C. There was no prosecutorial misconduct or trial court error in connection with the use of McCall as Rimbaud's interpreter.

Flores contends: (1) that the prosecutor improperly failed to disclose a "business relationship" between Rimbaud and his interpreter at trial, Joelle McCall, Brief 38; and, (2) that the trial court committed prejudicial error in permitting McCall to act as Rimbaud's interpreter, Brief 44. The record is clear, however, that the pre-trial contact between Rimbaud and McCall was entirely inconsequential and occurred during a time when she had acted as an interpreter for him, and further that this contact was properly disclosed to the defendant.

1. The prosecutor disclosed the pretrial contact between Rimbaud ad McCall.

Rimbaud, who was in custody for a period including both the *Santana* trial and the trial in this case, applied for parole during the intervening period. In this connection, he asked McCall, who acted as his interpreter at the *Santana* trial,* to forward copies of his books to certain publishers. In a letter to the parole board, he also wrote that McCall, who "*acted* as my literary agent", (emphasis added), was forwarding copies of his books to the parole board. The Government supplied this letter marked as "GX 3531-QQQ" to the defense.

Relying on the letter, defense counsel elicited the following testimony on cross-examination of Rimbaud: that McCall was not his literary agent but had acted as one (Tr. 293); that she took "some time" to forward

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* The transcript of the Santana trial was, of course, public record and thus aavilable to Flores.

his books to publishing houses but was never paid for this (Tr. 294); and that she forwarded three copies of Rimbaud's books to the parole board (Tr. 295; GX 3531-QQQ).*

Flores apparently contends that the Government somehow violated the Jencks Act, 18 U.S.C. § 3500, which requires the Government to turn over the statement of a witness "which relates to the subject matter as to which the witness has testified [on direct examination];" and that the Government failed to fulfill its obligation under *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963), to turn over "evidence favorable to an accused. . . ." Although the cover letter written by Rimbaud falls into neither category, *see United States* v. *Cardillo*, 316 F.2d 606, 615 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963); *Goldberg* v. *United States*, 425 U.S. 94 (1976), the Government did provide the letter to the defendant stating in full the nature of the so-called business relationship between Rimbaud and McCall.

2. The trial court did not err in permitting McCall to act as an interpreter.

Flores complains on appeal that the "business relationship" between Rimbaud and the interpreter denied him a fair trial. As indicated, the relationship was in

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* During this cross-examination, defense counsel asked, to no avail, if Rimbaud and McCall had "retired" to a room together (Tr. 279). Moreover, in summation, defense counsel recklessly stated—totally without support in fact or in the record—that McCall was working for the Government, that she was Rimbaud's literally agent, and that it would help her if Rimbaud is released from Jail (Tr. 153). These leering attempts to insinuate a relationship that did not exist are consistent with the approach taken in Flores' brief.

fact the most trivial of contacts that was blown far out of proportion (and exploited) by defense counsel. In addition, Flores provides no indication of specific instances of prejudice resulting to him from McCall's interpretation, and the record discloses none.

The exercise of the trial court's discretion with respect to choosing interpreters is not to be disturbed on review in the absence of some evidence from which prejudice can be inferred. *Chee* v. *United States*, 449 F.2d 747, 748 (9th Cir. 1971); *United States* v. *Guerra*, 334 F.2d 138, 143 (2d Cir. 1964); *United States* v. *Frank*, 494 U.S. F.2d 145, 157-58 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). In this case, the minimal contact between witness and interpreter was clearly insufficient to establish prejudice in the absence of a showing of actual bias of misconduct. *United States* v. *Lozano*, 511 F.2d 1 (7th Cir.), *cert. denied*, 423 U.S. 850 (1975); *United States* v. *Addonizio*, 451 F.2d 49, 68 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972). *See also United States* v. *Cheung*, *supra*, slip op. at 2072-73. Moreover, at the outset of the trial, defense counsel did not object to the use of this interpreter. (Tr. 47-48). During the course of McCall's six days of interpretation (August 17-20, 23-24, 1976), defense counsel objected only five times to McCall's translation. (Tr. 54, 84, 106, 107, 127-29). These "numerous" problems with interpretation claimed by Flores (Br. 44) were uniformly of minimal significance. *United States* v. *Guerra*, *supra* at 143. Furthermore, the Government suggested at one point in the proceedings "that if the interpreter is going to be challenged, [let defense counsel] bring an interpreter here." (Tr. 128). The Government was not stating dissatisfaction on its part with the interpreter, as suggested by Flores on

appeal (Br. at 44);* rather, the Government was offering the defendant the opportunity to choose its own interpreter. Since Flores did not make use of that opportunity, he cannot complain on appeal.

D. The prosecutor did not make an improper and prejudicial statement to the press.

On August 26, 1976, the day following the summations in this case, the *New York Daily News* published a four-paragraph article concerning the case. Flores contends that he was unfairly prejudiced because of references in the article to a statement by the prosecutor. This claim is frivolous.

As stated in the article itself and as defense counsel recognized in bringing the article to the attention of the trial court, the statement mentioned in the article was made in the course of the prosecutor's summation "during the Manhattan Federal Court trial of Antonio Flores . . ." (Tr. 1222). The statement in the article was, therefore, a matter of public record already presented to the jury and was not an extrajudicial statement.

Moreover, at the time defense counsel brought the article to the attention of the trial court, the jury was already deliberating. The Court, therefore, properly refused at that time to caution the jury not to read the publicity about the trial. (Tr. 1222). In any event, the jurors were well aware of their obligations in this re-

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* Flores quotes the immediately preceding statement by the prosecutor:

> "Your Honor, if the interpreter is going to be continually challenged, why don't we have another interpreter." (Tr. 127).

spect since the trial court had instructed them on several occasions in this regard. (Tr. 172, 458, 659-60).* Furthermore, after the verdict defense counsel did not ask the court to inquire whether the jurors had read the articles, nor was it the subject of any post-trial motions. *See generally United States* v. *Capra*, 501 F.2d 267, 278-79 (2d Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *United States* v. *Pfingst*, 477 F.2d 177, 185-86 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973).**

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* At the outset of the trial, the Court instructed the jury not to read anything about the case. (Tr. 172). When a *New York Post* story was brought to the attention of the Court (Tr. 287), the court advised the jury: "don't read anything about narcotics. I want to remind you about [that]." (Tr. 458). On August 23, 1976, when defense counsel made an objection about the extent of news coverage, the Government represented that there had been two *Daily News* articles, a *Post* article, an *El Diario* article and an *Amsterdam News* article about the trial. The Government also represented, on information and belief, that there had been coverage on radio and television. (Tr. 655). The court at that time inquired of the jurors whether anyone had read or heard of the publicity about the trial. Only one juror had; she had heard merely an announcement of the trial on the radio. (Tr. 659-60).

** In *Capra*, the Court stated:

> "Absent proof of bias on the part of individual members of the jury, reversal, because of extensive publicity adverse to the accused, is required where, after reading or hearing it, a resulting conclusion of guilt in the minds of the general public would be practically certain [citation omitted], or where improper pressure on a jury was clear from the record itself [citation omitted], neither of which the trial court found here." *Id.* at 279.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Form 280 A. - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

John P. Flannery being duly sworn deposes and says that he (she) is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the day of he ~~(she)~~ served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Stuart Shaw, Esq
600 ~~Ma~~dison Avenue
New York, N.Y. 10022

And deponent further says that he (she) sealed the said envelope and placed the same in the mailbox for mailing at the United States Attorney's Office, Southern District of New York, One St. Andrew's Plaza, New York, N.Y. 10007, in the Borough of Manhattan, City of New York.

John Flannery II

Sworn to me before this

28th day of March, 1977

Jeanette Ann Grayer

JEANETTE ANN GRAYER
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979